SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No.....

THOMAS H. O'NEAL,
Petitioner and Appellant Below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit has not been officially reported, but is found in the record filed herewith at pages 36 to 44, inclusive.

Th opinion of the United States District Court for the Middle District of Tennessee, Nashville Division, appears only in the form of the commitment in the record filed herewith at pages 14 to 16, inclusive.

Note: All emphasizing type in this brief ours unless otherwise indicated.

II.

JURISDICTION.

(1) The date of the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit to be reviewed is February 11, 1944, and this petition has been filed within the time provided by statute (R. pp. 35, 36-44).

(2) The statutory provision, which is believed to sustain the jurisdiction of this Court, is United States Code, Annotated, Title 28, Section 347; Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938.

(3) This case involves the constitutionality of certain Federal statutes and regulations alleged to have been promulgated pursuant thereto, for a violation of which the petitioner was convicted in a criminal case, and under United States Code, Annotated, Title 28, Section 347; Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, the only method to review the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit is by petition to this Court for the writ of certiorari.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under Section I (supra, pp. 1-2), which is here adopted and made a part of this brief. It is unnecessary to review the facts appearing in the Bill of Exceptions in this case (R. pp. 19-32), because the petitioner relied entirely in the United States Circuit Court of Appeals for the Sixth Circuit, and relies now solely upon the unconstitutionality of the statutes and the regulations promulgated pursuant thereto, for a violation of which he was convicted in this case.

IV.

SPECIFICATIONS OF ERRORS.

(1) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that Title III, Section 2 (a) of the Second War Powers Act of 1942, approved March 27, 1942 (Public Law 507, Seventy-Seventh Congress, Second Session), and the Revised Tire Rationing Regulations as amended, are constitutional and valid, and in sustaining the petitioner's conviction in this case for a violation thereof (R. pp. 35, 36-44).

(2) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that Section 4 (a) of the Emergency Price Control Act of 1942, and Revised Price Schedule No. 66 are constitutional and valid, and in sustaining the petitioner's conviction in this case for a violation thereof (R. pp. 35, 36-44).

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

POINT A: The Second War Powers Act of 1942 is unconstitutional because it delegates pure legislative power to the President.

POINT B: The Revised Tire Rationing Regulations are invalid.

POINT C: The Emergency Price Control Act of 1942 is unconstitutional because it delegates pure legislative power to the President.

POINT D: Revised Price Schedule No. 66 is invalid.

POINT A.

The Second War Powers Act of 1942 Is Unconstitutional Because It Delegates Pure Legislative Power to the President.

The portion of Title III, Section 2 (a), of the Second War Powers Act of 1942, which is claimed as authority for the Revised Tire Rationing Regulations that the petitioner is charged with having violated in the first two counts of the indictment, provides as follows:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in the shortage of the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

This is an unconstitutional delegation to the Executive of purely legislative power.

Article I, Section 1, of the Constitution of the United States provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The "Legislative Powers" referred to in Section 1 are enumerated in Article I, Section 8, of the Constitution, and that Section is entirely silent as to vesting in the Congress any power to delegate to others its legislative functions.

> "That Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."
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> *Marshall Field & Company v. Clark,* 143 U. S. 692, 36 L. Ed. 309;
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> *Schechter Poultry Corporation v. United States,* 295 U. S. 495, 79 L. Ed. 1570;
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> *Panama Refining Company v. Ryan,* 293 U. S. 388, 79 L. Ed. 446.

Since the decision of *United States v. Grimaud,* 220 U. S. 506, 55 L. Ed. 563, it has been recognized as permissible for the Congress to delegate to the Executive, or to a specifically named officer of the Government, the power, within well-defined limits, to promulgate rules and regulations, and that as an incident thereto the Congress may provide for the punishment of any infraction of the rules and regulations thus formulated. However, this power of the Congress is by no means unlimited. This was clearly recognized by the Court in the Grimaud case, supra, in this language:

> "It must be admitted that it is difficult to define the lines which separate legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in Wayman v. Southard, 10 Wheat. 42, 6 Law. Edition 262, where he

was considering the authority of courts to make rules. He there said: 'It will not be contended that Congress can delegate to the courts or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the Legislature may rightfully exercise itself.' What were these nonlegislative powers which Congress *could* exercise, but which might also be delegated to others, was not determined, for he said: 'The line has not been exactly drawn which separates those important subjects which *must* be entirely regulated by the Legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.'

"From the beginning of the Government, various acts have been passed conferring upon Executive Officers power to make rules and regulations,—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury alone."

United States v. Grimaud, supra.

It was not until the "Hot Oil" and the "Sick Chicken" cases arose that this Court was called upon to clearly define what the Congress could and could not do in this field of delegation of power.

In the "Hot Oil" case (*Panama Refining Company v. Ryan*, supra) the Court was dealing with Section 9 (c) of Title I of the National Industrial Recovery Act of June 16, 1933, which authorized the President by Executive Order to prohibit the transportation in Interstate Commerce of

petroleum produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn by any State law or regulation. The Court held this to be an unconstitutional delegation of legislative functions. The Court, after a careful analysis of the preamble of NIRA and of all of the provisions thereof, reached this conclusion:

> "None of these provisions can be deemed to prescribe any limitation of the grant of authority in Section 9 (c).
>
> "Fifth. The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted and will act, for what he believes to be the public good. The point is not one of motives, but of constitutional authority, for which the best motives is not a substitute. While the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted by Section 9 (c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a Board or Commission such as it may select or create for the purpose. Nor, with respect to such a delegation, is the question concerned merely with the transportation of oil, or of oil produced in excess of what the State may allow. If legislative power may thus be vested in the President, or other grantee, as to that excess of production, we see no reason to doubt that it may similarly be vested with respect to the transportation of oil without reference to the State's requirements. That reference simply defines the subject of the prohibition which the President is authorized to enact, or not to enact, as he pleases. And if that legislative power may be given to the President or other grantee, it would seem to follow that such power may similarly be conferred with respect to the transportation of other commodities in Interstate Com-

merce with or without reference to State action, thus giving to the grantee of the power the determination of what is a wise policy as to that transportation, and authority to permit or prohibit it, as the person, or board or commission, so chosen, may think desirable. In that view, there would appear to be no ground for denying a similar prerogative of delegation with respect to other subjects of legislation.

"The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, Sec. 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, Sec. 8, Paragraph 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exercise would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

"The Court has had frequent occasion to refer to these limitations and to review the course of congres-

sional action. At the very outset, amid the disturbances due to war in Europe, when the national safety was imperiled and our neutrality was disregarded, the Congress passed a series of acts, as a part of which the President was authorized, in stated circumstances, to lay and revoke embargoes, to give permits for the exportation of arms and military stores, to remit and discontinue the restraints and prohibitions imposed by acts suspending commercial intercourse with certain countries, and to permit or interdict the entrance into waters of the United States of armed vessels belonging to foreign nations. These early acts were not the subject of judicial decision and, apart from that, they afford no adequate basis for a conclusion that Congress assumed that it possessed an unqualified power of delegation. They were inspired by the vexations of American commerce through the hostile enterprises of the belligerent powers, they were directed to the effective execution of policies repeatedly declared by the Congress, and they confided to the President, for the purposes and under the conditions stated, an authority which was cognate to the conduct by him of the foreign relations of the Government.

"The first case relating to an authorization of this description was that of The Aurora, 7 Cranch. 382, 3 L. Ed. 378. The cargo of that vessel had been condemned as having been imported from Great Britain in violation of the nonintercourse Act of March 1, 1809. 2 Stat. at L. 528, chap. 24. That Act expired on May 1, 1810, when Congress passed another Act (2 Stat. at L. 605, 606, chap. 39) providing that in case either Great Britain or France, before March 3, 1811, 'shall . . . so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, which fact the President of the United States shall declare by proclamation, and if the other nation shall not within three months thereafter so revoke or modify her edicts in like manner,' then, with respect to that nation, as stated, the provisions of the Act of 1809, after three months from that proclamation, 'shall . . .

be revived and have full force and effect.' On November 2, 1810, the President issued his proclamation declaring that France had so revoked or modified her edicts, and it was contended that the provisions of the Act of 1809, as to the cargo in question, had thus been revived. The Court said that it could see no sufficient reason why the Legislature should not exercise its discretion in reviving the Act of 1809, 'either expressly or conditionally, as their judgment should direct.' The provision of that Act declaring 'that it should continue in force to a certain time, and no longer,' could not restrict the power of the legislature to extend its operation 'without limitation upon the occurrence of any subsequent combination of events.' This was a decision, said the Court in Marshall Field & Co. v. Clark, 143 U. S. 649, 683, 36 L. Ed. 294, 307, 12 S. Ct. 495, 'that it was competent for Congress to make the revival of an act depend upon the proclamation of the President, showing the ascertainment by him of the fact that the edicts of certain nations had been so revoked or modified that they did not violate the neutral commerce of the United States.'

"In Marshall Field & Co. v. Clark, supra, the Court applied that ruling to the case of 'the suspension of an act upon a contingency to be ascertained by the President, and made known by his proclamation.' The Court was dealing with Sec. 3 of the Act of October 1, 1890, 26 Stat. at L. 567, 612, chap. 1244. That section provided that, 'with a view to secure reciprocal trade' with countries producing certain articles, 'whenever, and so often as the President shall be satisfied' that the Government of any country producing them imposed 'duties or other exactions upon the agricultural or other products of the United States' which, in view of the free list established by the Act, the President 'may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty,' to suspend the free introduction of those articles by proclamation to that effect, and that during that suspension the duties specified by the section should be

levied. The validity of the provision was challenged as a delegation to the President of legislative power. The Court reviewed the early acts to which we have referred, as well as later statutes considered to be analogous. While sustaining the provision, the Court emphatically declared that the principle that 'Congress cannot delegate legislative power to the President' is 'universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' The Court found that the act before it was not inconsistent with that principle; that it did not 'in any real sense invest the President with the power of legislation.' As 'the suspension was absolutely required when the President ascertained the existence of a particular fact,' it could not be said 'that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.' 'He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.' Id., pp. 692, 693. The Court referred with approval to the distinction pointed out by the Supreme Court of Ohio in Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 88, between 'the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.'

"Applying that principle, authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed, have constantly been sustained. Moreover, the Congress may not only give such authorizations to determine specific facts but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy, that is, as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature. Wayman v. Southard, 10 Wheat. 1, 43, 6 L. Ed. 253, 262. In Butterfield v. Stranahan, 192 U. S. 470, 496, 48 L. Ed. 525, 535, 24 S. Ct. 349, the Act of

March 2, 1897 (29 Stat. at L. 604, chap. 358, U. S. C., title 21, Sec. 41), was upheld, which authorized the Secretary of the Treasury, upon the recommendation of a board of experts, to 'establish uniform standards of purity, quality, and fitness for the consumption of all kinds of teas imported into the United States.' The Court construed the statute as expressing 'the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality.' *The Congress, the Court said, thus fixed 'a primary standard, and committed to the Secretary of the Treasury 'the mere executive duty to effectuate the legislative policy declared in the statute.' 'Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.'* See Red 'C' Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 394, 56 L. Ed. 240, 245, 32 S. Ct. 152.

"Another notable illustration is that of the authority given to the Secretary of War to determine whether bridges and other structures constitute unreasonable obstructions to navigation and to remove such obstructions. Act of March 3, 1899, Sec. 18, 30 Stat. at L. 1153, 1154, chap. 425, U. S. C., title 33, Sec. 502. By that statute the Congress declared 'a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule' as thus laid down. Union Bridge Co. v. United States, 204 U. S. 364, 386, 51 L. Ed. 523, 533, 27 S. Ct. 367; Monongahela Bridge Co. v. United States, 216 U. S. 177, 193, 54 L. Ed. 435, 442, 30 S. Ct. 356; Philadelphia Co. v. Stimson, 223 U. S. 605, 638, 56 L. Ed. 570, 584, 32 S. Ct. 340. Upon this principle rests the authority of the Interstate Commerce Commission, in the execution of the declared policy of the Congress in enforcing reasonable rates, in preventing undue preferences and unjust discriminations, in requiring suitable facilities for transportation in interstate commerce, and in exercising other powers held to have been validly

conferred. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 287, 52 L. Ed. 1061, 1064, 28 S. Ct. 616; Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.), 234 U. S. 467, 486, 58 L. Ed. 1408, 1422, 34 S. Ct. 986; Avent v. United States, 266 U. S. 127, 130, 69 L. Ed. 202, 204, 45 S. Ct. 34; New York Cent. Securities Corp. v. United States, 287 U. S. 12, 24, 25, 77 L. Ed. 138, 145, 146, 53 S. Ct. 45. Upon a similar ground the authority given to the President, in appropriate relation to his functions as Commander-in-Chief, by the Trading with the Enemy Act, as amended by the Act of March 28, 1918 (40 Stat. at L. 460, chap. 28, U. S. C., appx. title 50, Sec. 12), with respect to the disposition of enemy property, was sustained. 'The determination,' said the Court, 'of the terms of sale of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the Act.' United States v. Chemical Foundation, 272 U. S. 1, 12, 71 L. Ed. 131, 141, 47 S. Ct. 1.

"The provisions of the Radio Act of (February 23) 1927 (44 Stat. at L. 1162, 1163, chap. 169, U. S. C., title 47, Sec. 81), providing for assignments of frequencies or wave lengths to various stations, afford another instance. In granting licenses, the Radio Commission is required to act 'as public convenience, interest, or necessity required.' In construing this provision, the Court found that the statute itself declared the policy as to 'equality of radio broadcasting service, both of transmission and of reception,' and that it conferred authority to make allocations and assignments in order to secure, according to state criteria, an equitable adjustment in the distribution of facilities. The standard set up was not so indefinite 'as to confer an unlimited power.' Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co., 289 U. S. 266, 279, 285, 77 L. Ed. 1166, 1175, 1178, 53 S. Ct. 627, 89 A. L. R. 406.

"So, also from the beginning of the Government, the Congress has conferred upon executive officers the

power to make regulations—'not for the government of their departments, but for administering the laws which did govern.' United States v. Grimaud, 220 U. S. 506, 517, 55 L. Ed. 563, 567, 31 S. Ct. 480. Such regulations become, indeed, binding rules of conduct, but they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined. In the Case of Grimaud, supra, a regulation made by the Secretary of Agriculture requiring permits for grazing sheep on a forest reserve of lands belonging to the United States was involved. The Court referred to the various acts for the establishment and management of forest reservations and the authorization of rules which would 'insure the objects of such reservation,' that is, 'to regulate their occupancy and use and to preserve the forests thereon from destruction. The Court observed that 'it was impracticable for Congress to provide general regulations for these various and varying details of management,' and that, in authorizing the Secretary of Agriculture to meet local conditions, Congress 'was merely conferring administrative functions upon an agent, and not delegating to him legislative power.' Id., pp. 515, 516. The Court quoted with approval the statement of the principle in Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. Ed. 294, 12 S. Ct. 495, supra, that the Congress cannot delegate legislative power, and upheld the regulation in question as an administrative rule for the appropriate execution of the policy laid down in the statute. See Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, supra; Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 214, 215, 56 L. Ed. 729, 737, 738, 32 S. Ct. 436; Selective Draft Law Cases (Arver v. United States), 245 U. S. 366, 389, 62 L. Ed. 352, 357, 38 S. Ct. 159, L. R. A. 1918 C 361, Ann. Cas. 1918 B 856; McKinley v. United States, 249 U. S. 397, 63 L. Ed. 668, 39 S. Ct. 324.

"The applicable considerations were reviewed in J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348, where the Court dealt

with the so-called 'flexible tariff provision' of the Act of September 21, 1922 (42 Stat. at L. 858, 841, 942, chap. 356), and with the authority which it conferred upon the President. The Court applied the same principle that permitted the Congress to exercise its rate-making power in interstate commerce, and found that a similar provision was justified for the fixing of customs duties; that is, the Court said, 'If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority.' The Court sustained the provision upon the authority of Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. Ed. 294, 12 S. Ct. 495, supra, repeating with approval what was there said—that 'What the President was required to do was merely in execution of the act of Congress.' Id., pp. 409-411.

"*Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that Section 9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.*

"If Section 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function the Congress could at will and

as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

It can certainly be said of the provisions of the Second War Powers Act of 1942, above quoted, that therein the Congress has "declared no policy," has "established no standard," has "laid down no rule," has prescribed "no requirement, no definition of the circumstances or conditions" under which the President is to exercise rationing powers. The only "standard" prescribed is, "Whenever the President is satisfied that the fulfillment of the requirements for the defense of the United States will result in a shortage." It is not the President who must be "satisfied" to execute the delegated power. The "satisfaction" must be that of Congress. To be a valid delegation, the Act of Congress must prescribe the facts and circumstances, the existence of which would *satisfy* Congress of the necessity for the exercise of the delegates' power, and it can then delegate to the President the duty of determining the existence or nonexistence of such facts. Nor does the Act define what Congress meant by "a shortage in the supply of any material." Our supply of a particular material may be sufficient only to meet the needs of one month, one year, ten years, or one hundred years, and in neither event the President may be "satisfied" that a "shortage" exists, but when would Congress be satisfied? The Statute leaves us without an answer. As stated by this Court in *Panama Refining Company v. Ryan*, supra, the answer is not supplied by the assumption "that the President has acted, or will act, for what he believes to be the public good."

This question of delegation of legislative power was likewise involved in *Schechter v. United States*, supra. There the Court said:

"Two preliminary points are stressed by the government with respect to the appropriate approach of the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."

Schechter v. United States, 295 U. S. 521, 528, 79 L. Ed. 1570, 1579.

The Court then dealt specifically with the question of the delegation of legislative power. It referred to *Panama Refining Company v. Ryan*, supra, and pointed out that there the question was with respect to the range of discretion given to the President in prohibiting transportation of hot oil, whereas in the "Sick Chicken" case "the question is more fundamental. It is whether there is any adequate definition of the subject to which the Codes are to be addressed." In discussing the "Code" Provisions of NIRA, the Court said:

"What is meant by 'fair competition' as the term is used in the Act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulator of a code for

a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction and expansion which are stated in the first section of Title I?

"The act does not define 'fair competition.' 'Unfair competition' as known to the common law is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. (Citing cases.) In recent years its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation to the selling of another's goods as one's own—to misappropriation of what equitably belongs to a competitor. (Citing cases.) . . .

. . .

"The question, then, turns upon the authority which Section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. (Citing cases.)

"Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion. First, the President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code, 'impose no inequitable restrictions on admission to membership' and are 'truly representative.' That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. Second, the President is required to find that the code is not 'designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them.' And to this is added a proviso that the code 'shall not

permit monopolies or monopolistic practices.' But these restrictions leave virtually untouched the field of policy envisaged by Section 1, and in that wide field of legislative possibilities the proponents of a code, refraining from monopolistic designs, may roam at will and the President may approve or disapprove their proposals as he may see fit. That is the precise effect of the further finding that the President is to make—that the code 'will tend to effectuate the policy of this title.' While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the 'Declaration of Policy.'

"Nor is the breadth of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The act provides for the creation by the President of administrative agencies to assist him, but the action or reports of such agencies, or of his other assistants—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify or reject them as he pleases. Such recommendations or findings in no way limit the authority which Section 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

"Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies.

. . .

"*To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, Section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in Section 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.*" (Emphasis ours.)

Schechter v. United States, supra.

Mr. Justice Cardozo, in a concurring opinion, characterized the unfettered discretion vested in the President by NIRA in this language:

> "Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them."

Schechter v. United States, supra.

There is another infirmity in the Second War Powers Act of 1942 that is fatal to the indictment in this case. Throughout the opinions of this Court in *United States v. Grimaud; Panama Refining Company v. Ryan*, and

Schechter v. United States, there is the thought repeatedly emphasized that, under certain circumstances, the Congress may delegate the rule-making power to certain officers or agencies of the Government, "*selected by it*," or to "*selected instrumentalities.*" In other words, in every case where the delegation is permissible, the Congress must select the grantee of the delegated power. That is a legislative function which cannot be delegated to others under any circumstances. We have been able to find no case upholding the power of the Congress to delegate to the President or to anyone else the power to delegate the rule-making power to a third person, yet that is exactly what was attempted by the Second War Powers Act of 1942, and, as shall be hereinafter pointed out, the regulations, the alleged violation of which is sought to be here punished, were not promulgated by the President, or even by the agency to which he attempted to delegate the power that had been delegated to him, but rather by a fourth agency to which the President's grantee had attempted to delegate the power.

We have reference to Section 2 (a) (8) of the Second War Powers Act of 1942, which provides:

> "The President may exercise any power, authority or discretion conferred on him by this subsection (a), through such department, agency or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

In addition to the cases already cited, the following cases likewise limit the power of Congress to delegate to such agencies as Congress itself may select—not to such as may be selected by others:

United States v. Heinszen, 208 U. S. 370, 51 L. Ed. 1098;
Wallace v. Currin, 306 U. S. 1, 83 L. Ed. 441;
Houston etc. Railway Co. v. U. S., 234 U. S. 342, 58 L. Ed. 1341.

In its last analysis, what Congress had said to the President in the section of the Recovery Act which was involved in the "Sick Chicken" case was this:

> "A serious situation exists. Do something about it."

By the Rationing Provision of the Second War Powers Act of 1942, the Congress has said to the President, "*When you are satisfied that a serious situation exists, do something about it.*" The first was held to be an unconstitutional delegation of legislative power, notwithstanding the fact that there Congress itself had found *to its satisfaction* that a situation existed which needed correction. In the Second War Powers Act of 1942, no such situation was found by Congress to exist. The only rule, guide or yardstick to be applied by the President in determining whether or not a situation exists which calls for the exercise of the power sought to be delegated is the *President's satisfaction.* To this extent the Second War Powers Act is subject to an additional assault from which the Recovery Act was immune.

In the case of *Butler v. United States,* 78 F. (2d) 1, 12, the Court, in passing upon the constitutionality of the Agricultural Adjustment Act, said:

> "No standard or guide is here laid down to determine how the compensating tax shall be fixed or what element shall be taken into consideration in determining the amount, except that it shall be determined by the amount necessary to prevent such disadvantage in competition. We find no decision of the Supreme Court authorizing such a delegation of power to an administrative officer. On the contrary, the recent decision in the Panama Refining Co. Case and the Schechter Poultry Corporation Case, we think, clearly condemn it as unwarranted under the Constitution."

See, also, *Adkins v. Children's Hospital,* 261 U. S. 525, 67 L. Ed. 785.

The cases of *Henderson v. Smith-Douglass Company,* 44 Federal Supplement 681; *Henderson v. Bryan,* 46 Federal Supplement 682, and *Standard Oil Company v. Angle,* 128 Federal (2d) 728, are clearly distinguishable from the case now before the Court.

In *Henderson v. Smith-Douglass Company* (District Court, Eastern District of Virginia) the only attack made against the constitutionality of the Rationing Statutes and Regulations was that they amounted to a taking of private property for public use, and without just compensation. The Court rejected this attack upon the ground that there was no "taking" of property.

In *Henderson v. Bryan,* supra (District Court, Southern District of California), a similar attack was made, and the Court disposed of it merely by saying that the power of the President and his subordinates to allocate or ration material had been upheld by His Honor in an earlier case, by the Virginia Court in the Smith-Douglass case, and by the Fifth Circuit Court of Appeals in the Standard Oil Company case. The Court was mistaken in its reference to the Standard Oil Company case, as we shall now demonstrate.

In *Standard Oil Company v. Angle* (C. C. A. 5), 128 Fed. (2d) 728, the only question involved was whether the Rationing Regulations, properly construed, authorized the Collector of Customs to withhold delivery of imported tires. The Court in its opinion was careful to point out that "not at all bringing into question the validity or authority of the Regulations, but pitching its case entirely upon their construction, appellant insists. . . ." Thereby the Court disclaimed any intention of passing upon the validity of either the Regulations or of the Statutes under which they were promulgated, for no such questions were raised by counsel. So far as we have been able to find to this time, no appellate court has sustained the constitutionality of these Tire Rationing Regulations or of the

Statutes underlying them, and no District Court has passed upon the constitutional questions here raised.

In the case of *United States v. Wright*, 48 F. Supp. 687, involving the rationing of sugar, a Delaware District Judge held that the Priorities and Allocations Act is valid and does not amount to an unconstitutional delegation of legislative power. This case does not involve the questions presented herein because the first two counts of the information in this case are based upon the Revised Tire Rationing Regulations issued pursuant to the broad powers conferred upon the President by Title III, Section 2 (a), of the Second War Powers Act of 1942, and the third count of the information is based upon a violation of Section 4 (a) of the Emergency Price Control Act of 1942 and Revised Price Schedule No. 66.

It seems to us that the learned Circuit Court of Appeals made no real effort to distinguish the decisions of this Court relied on herein.

POINT B.

The Revised Tire Rationing Regulations Are Invalid.

This claim of invalidity is based upon the following grounds: (1) The underlying Statute purporting to authorize the regulations falls for the reasons heretofore stated; (2) even if we concede that the Congress has constitutionally delegated *to the President* the authority to formulate these regulations, the regulations are not the handiwork of the President, and the Congress may not constitutionally delegate to him the power to delegate to others the authority to formulate the regulations (This for the reasons already stated); (3) the regulations were not formulated either by the President or the President's grantee, but by a grantee of the President's grantee, and this passing of the power from pillar to post is not authorized by the Statute; (4) the Office of Price Administration is not such department, agency or officer of the Government as was

contemplated by the Second War Powers Act of 1942, to which it was intended that the rationing power might be delegated. A historical statement of the Tire Rationing Program will, we believe, demonstrate the existence of each of these infirmities.

The Rationing Program came into being in this manner:

(a) The Priorities and Allocations Act of June 28, 1940 (41 U. S. C. A., Prec. Section 1, Note), as amended by the Act of May 31, 1941 (1941 Advance Sheets, page 232), provides:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the National Defense. . . .
>
> "The President may exercise any power, authority, or discretion conferred on him by this section, through such department, agency, or officer of the Government as he may direct and in conformity with any rules and regulations which he may prescribe."

(b) Executive Order 8875 of August 28, 1941, delegated rationing functions to O. P. M.

(c) On December 27, 1941, O. P. M. issued its Order M-15-1C, delegating the tire rationing functions to O. P. A.

(d) Executive Order No. 9024 of January 16, 1942, created the War Production Board and authorized it to perform rationing functions by reference to Executive Order No. 8875.

(e) Executive Order 9040 of January 24, 1942, abolished O. P. M. and enlarged the functions of W. P. B.

(f) On January 24, 1942, W. P. B., by Directive Order No. 1, delegated to O. P. A. general rationing functions relating to sales at retail.

(g) On February 11, 1942, O. P. A. promulgated its Tire Rationing Regulations, the violation of which is sought to be here punished.

(h) Executive Order No. 9125 of April 7, 1942, purported to authorize the Chairman of W. P. B. to delegate to O. P. A. all rationing functions, and attempted to ratify all Tire Rationing Regulations theretofore promulgated.

(i) On March 27, 1942, the Second War Powers Act of 1942 was approved by the President.

It is apparent from this summary that:

(1) The Tire Rationing Regulations forming the basis of the information in this case were never promulgated by the President. His attempted "ratification" thereof by Executive Order No. 9125 cannot have the effect of lending validity thereto. Assuming there has been a valid delegation to the President of certain legislative functions, these functions are not exercised by the President by "ratification" of acts of others. Traditionally it is not the function of a legislative body to "ratify," approve, O. K. or "rubber stamp" the acts of others.

(2) These Rationing Regulations must stand or fall in accordance with whether the originators thereof did or did not have the constitutional authority to "enact" them. No act of Congress has ever delegated to O. P. A. the authority to enact them. No act of Congress has delegated to the President the authority to delegate to W. P. B. the power to enact them. No act of Congress has delegated to the President the power to delegate to W. P. B. or its Chairman the power to delegate to O. P. A. the power to formulate these regulations. Therefore, they are not the product

of Congress or of any "instrumentality selected by it." They are not statutes, and, since they are not linked to the Legislative Branch of the Government by an *unbroken* chain, they cannot be given the force and effect of statutes, hence a violation thereof is not punishable under the Criminal Provisions of the Second War Powers Act of 1942.

(3) O. P. A. is not such department, agency or officer of the Government as was contemplated by the amendment of May 31, 1941, to the Priorities and Allocations Act, to which the President might delegate rationing functions (assuming for the moment such power of delegation might lawfully be granted). O. P. A. was not then in existence, but was created by the Act of June 30, 1942. The Act of June 30, 1942, does not authorize the President to delegate to O. P. A. the function of rationing tires. The power of delegation there sought to be lodged in the President is limited to the power "to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing *conferred by law upon any other department or agency of the Government* with respect to any *particular* commodity or commodities." This is limited to the rationing of only such commodities as Congress has conferred *by law* and deals with "*particular*" commodities. Congress has not *by law* conferred any powers and functions relating to the rationing of rubber tires to any department or agency of the Government, unless it is done by the blanket authority of the Priorities and Allocations Act, in which event the above-quoted provision from the Act of January 30, 1942, could have no application, because the Priorities and Allocations Act does not deal with any "*particular* commodity or commodities." Moreover, the information in this case does not charge the petitioner with violating the Priorities and Allocation Act.

POINT C.

The Emergency Price Control Act of 1942 Is Unconstitutional Because It Delegates Pure Legislative Power to the President.

This Act, made the basis of the third count of the information in this case, is, we earnestly insist, unconstitutional for the same reasons heretofore advanced in connection with our insistence that the Second War Powers Act is unconstitutional.

Title 50, App. Section 902 of U. S. C. A. (Emergency Price Control Act of 1942), provides:

> "Whenever in the judgment of the Price Administrator (provided for in section 201) Section 921 of this appendix the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

An examination of the entire Act will reveal that it confers unlimited legislative power upon the Price Administrator without actually laying down in express terms a "standard" or rule to be followed by him. Such general terms as "speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation" and "general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941," permit the exercise of a pure discretionary power, and these terms are not so sufficiently defined as to sustain the authority delegated to the Price Administrator.

Wayman v. Southard, 10 Wheaton 1, 6 L. Ed. 253, 261.

If Congress undertakes to lay down a guide for an administrative office to follow in carrying out its mandates, it must be by an intelligent and a reasonably definite standard.

Adkins v. Children's Hospital, supra;
Butler v. United States, supra.

A New Jersey statute authorizing a commission to establish and revise from time to time air traffic rules for the navigation, protection and identification of aircraft, to establish standards of air-worthiness of aircraft, and to encourage and effect "so far as practicable" uniform field rules for air posts to coincide in so far as practicable the Federal Act governing aviation and making the violation of any rule or regulation adopted thereunder a misdemeanor, was held to be an unconstitutional delegation of legislative power since no standard of any nature was fixed by the Legislature.

State v. Larson, 10 N. J. Mis. R. 384, 160 Atl. 556.

It is true that the constitutionality of the Emergency Price Control Act of 1942 has been sustained in the cases of *Brown v. Wright,* 137 F. (2d) 484, in which Mr. Justice Northcott, Circuit Judge, dissented; *Brown v. Winter,* 50 F. Supp. 804, an opinion by the District Judge for the Western District of Wisconsin; *Brown v. Douglass,* 50 F. Supp. 877, an opinion by the District Court for the Northern District of Texas, which does not discuss the question of the unlawful delegation of legislative power relied upon herein; *United States v. Sosnowitz and Lotstein,* 50 F. Supp. 586, an opinion by the District Court, D. Conn., in which the Court relies upon the case of *United States v. Friedman,* 50 F. Supp. 584; and the case of *United States v. Hark,* 49 F. Supp. 95, an opinion by the District Court,

D. Mass. However, in spite of these opinions, it is our insistence that the Emergency Price Control Act of 1942, for the reasons stated in connection with our discussion of the Second War Powers Act, is unconstitutional because it unlawfully delegates pure legislative power to the Price Administrator. *This Court has never decided the question presented herein as far as we are advised.*

POINT D.

Revised Price Schedule No. 66 Is Invalid.

Of course, if the Emergency Price Control Act of 1942 is unconstitutional, it necessarily follows that there was no authority for the issuance of Revised Price Schedule No. 66, which the petitioner is charged with violating in the second count of the information.

If complicated regulations of this character can be promiscuously promulgated without express congressional authority and without any definite "standard" prescribed by Congress, the liberties and human rights of individuals will soon be so circumvented by a maze of regulations that few people know about, and fewer understand, that our cherished and envied constitutional government will soon become an empty form.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter

reviewing and reversing the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit, rendered February 11, 1944.

Respectfully submitted,

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